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Paper No. 8

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In re Application of	:	OFFICE OF PETITIONS
Bruce George Sharpe	:	
Application No. 10/010,607	:	DECISION DISMISSING PETITION
Filed: December 10, 2001	:	
For: Sharp Safe Hydraulic Retractable	:	
Syringe	:	

This is a decision on the paper entitled "Petition for Review under 1.183" filed January 23, 2002, requesting that the above-identified application be accorded a filing date of November 6, 2001, the date the International express post article containing the application was forwarded from Australia to the United States, or November 21, 2001, the date the application allegedly reached the Baltimore security mail station instead of its specifically designated address, the United States Patent and Trademark Office (USPTO).

A review of this application reveals that applicant has attempted to appoint an agent (Ian Gorman) who is not registered to practice before the U.S. Patent and Trademark Office, contrary to the Code of Federal Regulations, 37 CFR 1.31. For a power of attorney or authorization of agent to be valid, the agent appointed must be registered to practice before the U.S. Patent and Trademark Office in accordance with 37 CFR 10.6. Therefore, the appointment is void, *ab initio*. The Office will not recognize the appointment and all correspondence concerning this application must be signed by: 1) all named applicants (inventors), 2) all the owners of the rights to the invention, or 3) a registered attorney or agent duly appointed by the inventor(s) or the owner(s). Furthermore, all communications from the Office will be addressed to the named inventor, unless specific instructions to the contrary are supplied by the named inventor(s) or owner(s). See MPEP 402. Applicant's signature on the power of attorney submitted simultaneously with the petition is being construed as a ratification of the petition by the applicant.

It is noted that the original application papers were received at the USPTO on December 10, 2001 and have been assigned application No. 10/010,607.

The Office also acknowledges receipt of applicant's statement by facsimile on May 17, 2002. The original of this statement was also received in the mail on June 3, 2002 and both papers have been placed in the application file.

Petitioner indicates that this application was mailed to the USPTO via International Express Post Australia (International Express Post Article No. LX515449390AU) to the USPTO on November 5, 2001. Because the applicant is an Australian citizen, residing in Australia, the application was not filed with the United States Postal Service (USPS). Petitioners argue that granting a filing date in a reasonable time after the November 5, 2001 date, for example, November 6, 2001 the date the International express post article containing the application was forwarded from Australia to the United States, or November 21, 2001, the date the application allegedly reached the Baltimore mail station instead of its specifically designated address, the United States Patent and Trademark Office (USPTO), is appropriate. Petitioner maintains that any delay in the arrival of the package in the USPTO was completely unavoidable and that the application was diverted in transit without warning nor prior knowledge to the applicant. Petitioner further maintains that the provisions of the Berne Convention mitigate in favor of the positive consideration of this petition for a filing date in the United States as either November 6, 2001 or November 21, 2001, as set forth above.

The evidence and arguments submitted by petitioner have been considered; however, they are not convincing that this application was, in fact, received in the Office on November 6, 2001, November 21, 2001, or anytime prior to December 10, 2001.

35 U.S.C. 21(a) provides that:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

The Director has determined that only the USPS "Express Mail" procedure can be used for this purpose because the use of "Express Mail" provides very specific identifying information in advance which establishes both the date of mailing and the particular papers being filed.

Because the filing date of an application is much more critical than the filing date of papers accepted under 37 CFR 1.8, the USPTO promulgated a separate rule, 37 CFR 1.10, which sets forth a specific procedure which must be followed in order to establish the filing date as the date of deposit with the United States Postal Service (USPS) instead of the date of receipt in the Office.

The procedure in 37 CFR 1.10 requires the use of the "Express Mail Post Office to Addressee" service of the USPS. Correspondence sent by the "Express Mail Post Office to Addressee" service is considered filed in the Office on the "date-in" entered by the USPS. If the USPS deposit date cannot be determined, the correspondence will be accorded the date of receipt in the Office as the filing date. If the procedure is not followed, applicants bear the risk of any delay in the delivery of the application papers to the Office.

Although it is appreciated that petitioner is not a resident of the United States, the Office is bound by statute (35 U.S.C. 21) and by rules (37 CFR 1.6 and 1.10) in determining the date of receipt of correspondence with the Office. In the instant petition, there is no allegation that the application papers deposited on November 5, 2001, were deposited with the USPS in compliance with the "Express Mail" procedures set forth in 37 CFR 1.10. Petitioner had the option of depositing the application papers in USPS "Express Mail" service on November 5, 2001, in order to obtain the benefits of 37 CFR 1.10. Had petitioner followed the procedure set forth in 37 CFR 1.10, the application could have been accorded a filing date as of the date of deposit in "Express Mail" regardless of when the papers actually arrived in the Office. Thus, petitioner could have avoided the instant predicament by following the procedures established by the Director. Instead, petitioner chose to deposit the application papers in International Express Post and, as such, assumed the risk of any delay in the delivery to the Office. Petitioner's failure to take advantage of the established procedures is not a justification for accepting a date based upon the November 5, 2001 mailing of the instant application papers by Australia International Express Post as the filing date of the above-identified application. Therefore, the application is only entitled to the December 10, 2001 receipt date as the filing date of the application.

The best evidence of when particular application papers were actually received by the USPTO is a postcard receipt containing a specific itemization of all the items being submitted. See MPEP 503. The copy of applicant's postcard receipt submitted indicates receipt in the USPTO of the application papers on December 10, 2001 as evidenced by the bar code and date stamp on the front of the post card. Applicant's contention that the "21" in the partially obscured USPS postal mark "88 BALTIMORE MD 212 2001" is evidence that the application was received in the United States on November 21, 2001 and subsequently diverted prior to reaching the USPTO is unconvincing. The post card necessarily reached the USPTO as evidenced by the bar code label showing the application number and filing date. It is likely that the "21" is part of the ZIP code designation for Baltimore, MD because 21288 is a ZIP code association with Baltimore, MD.

In view of the above, the petition is dismissed.

On February 5, 2002, the \$130.00 petition fee was charged to applicant's credit card as authorized in the petition. The petition fee was necessary for consideration of the petition and will not be refunded.

The application is being returned to Initial Patent Examination Division for further processing with a filing date of December 10, 2001 including processing of the reply to the Notice to File Corrected Application Papers filed by facsimile on February 21, 2002. After processing in Initial Patent Examination Division, the application will be forwarded to the Technology Center for a decision on the Petition to Make Special.

Telephone inquiries specific to this matter should be directed to Darnell M. Jayne at (703) 305-3310.



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